

## **STATUS OF PENDING EN BANC CASES**

**Today's Date: January 5, 2009**

*This report is provided for case identification and background information only and does not reflect the views of the court.* When a case is heard or reheard en banc, the en banc court assumes jurisdiction over the entire case, see 28 U.S.C. § 46(c), regardless of the issue or issues that may have caused any member of the Court to vote to hear the case en banc. *Summerlin v. Stewart*, 309 F.3d 1193 (9th Cir. 2002)

### **Richter v. Hickman, 06-15614**

**Three-Judge Panel Opinion:** 521 F.3d 1222 (9th Cir. 2008)

**Order Taking Case En Banc:** 548 F.3d 1236 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** November 10, 2008

**Status:** Argued and submitted December 17, 2008

**Members of En Banc Court:** Alex Kozinski, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Barry G. Silverman, Kim M. Wardlaw, Raymond C. Fisher, Richard A. Paez, Jay S. Bybee, Milan D. Smith, Jr., Sandra S. Ikuta

**Subject Matter:** Appeal of the district court's denial of petitioners' 28 U.S.C. § 2254 habeas corpus petitions challenging jury convictions for murder, attempted murder, robbery and burglary.

**Holding:** Not yet decided

### **United States v. Hinkson, 05-30303**

**Three-Judge Panel Opinion:** 526 F.3d 1262 (9th Cir. 2008)

**Order Taking Case En Banc:** 547 F.3d 993 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** October 20, 2008

**Status:** Argued and submitted December 16, 2008.

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Kim M. Wardlaw, William A. Fletcher, Richard A. Paez, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta, N. Randy Smith

**Subject Matter:** Appeal of criminal conviction for soliciting the murder of federal officials.

**Holding:** Not yet decided

### **Murdoch v. Castro, 05-55665**

**Three-Judge Panel Opinion:** 489 F.3d 1063 (9th Cir. 2007)

**Order Taking Case En Banc:** 546 F.3d 1051 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** October 9, 2008

**Status:** Argument rescheduled to week of March 23, 2009 in San Francisco, California.

**Members of En Banc Court:** Not yet available

**Subject Matter:** Appeal of the district court's denial of petitioner's 28 U.S.C. § 2254 habeas corpus petition challenging his jury conviction for murder, following remand by this court.

**Holding:** Not yet decided

**Sanchez v. Mukasey, 04-75584**

**Three-Judge Panel Opinion:** 521 F.3d 1106 (9th Cir. 2008)

**Order Taking Case En Banc:** 546 F.3d 1051 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** October 9, 2008

**Status:** Argued and submitted December 15, 2008.

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Andrew J. Kleinfeld, Barry G. Silverman, M. Margaret McKeown, Raymond C. Fisher, Richard A. Paez, Consuelo M. Callahan, N. Randy Smith

**Subject Matter:** Petition for review from the Board of Immigration Appeals' denial of cancellation of removal to petitioner based on lack of good moral character due to alien smuggling.

**Holding:** Not yet decided.

**United States v. Comprehensive Drug Testing, Inc., 05-10067 +**

**Three-Judge Panel Opinion:** 513 F.3d 1085 (9th Cir. 2008)

**Order Taking Case En Banc:** 545 F.3d 1106 (9th Cir. September 30, 2008)

**Date of Order Taking Case En Banc:** September 30, 2008

**Status:** Argued and submitted December 18, 2008

**Members of En Banc Court:** Alex Kozinski, Andrew J. Kleinfeld, Susan P. Graber, Kim M. Wardlaw, William A. Fletcher, Richard A. Paez, Marsha S. Berzon, Consuelo M. Callahan, Carlos T. Bea, Milan D. Smith, Jr., Sandra S. Ikuta

**Subject Matter:** Consolidated appeals from orders issued by district judges in cases arising from the federal investigation into illegal steroid use by professional baseball athletes.

**Holding:** Not yet decided.

**United States v. Smith, 05-50375**

**Three-Judge Panel Opinion:** 520 F.3d 1097 (9th Cir. 2008)

**Order Taking Case En Banc:** 545 F.3d 1105 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** September 30, 2008

**Status:** Argued and submitted December 17, 2008

**Members of En Banc Court:** Alex Kozinski, Mary M. Schroeder, Stephen R. Reinhardt, Andrew J. Kleinfeld, Michael D. Hawkins, Susan P. Graber, Kim M. Wardlaw, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta

**Subject Matter:** Appeal of criminal conviction for assault with a dangerous weapon.

**Holding:** Not yet decided.

**Berger v. City of Seattle, 05-35752**

**Three-Judge Panel Opinion:** 512 F.3d 582 (9th Cir. 2008)

**Order Taking Case En Banc:** 533 F.3d 1030 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** July 14, 2008

**Status:** Argued and submitted September 23, 2008

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Michael D. Hawkins, Kim M. Wardlaw, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Milan D. Smith, Jr., N. Randy Smith

**Subject Matter:** Appeal of the district court's summary judgment finding that provisions of the Campus Rules restricting speech activities at the Seattle Center were unconstitutional on their face, in a 42 U.S.C. § 1983 action brought by a street performer.

**Holding:** Not yet decided.

**State of Alaska v. EEOC, 07-70174**

**Three-Judge Panel Opinion:** 508 F.3d 476 (9th Cir. 2007)

**Order Taking Case En Banc:** 531 F.3d 1002 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** July 3, 2008

**Status:** Argued and submitted September 24, 2008

**Members of En Banc Court:** Alex Kozinski, Mary M. Schroeder, Diarmuid F. O'Scannlain, Sidney R. Thomas, Barry G. Silverman, Kim M. Wardlaw, Marsha S. Berzon, Richard C. Tallman, Consuelo M. Callahan, Milan D. Smith, Jr., Sandra S. Ikuta

**Subject Matter:** Petitions for review from the United States Equal Employment Opportunity Commission's denial of the State of Alaska's appeal from an administrative law judge's orders regarding discrimination complaints against the State under the Government Employees Rights Act of 1991.

**Holding:** Not yet decided.

**Hayward v. Marshall, 06-55392**

**Three-Judge Panel Opinion:** 512 F.3d 536 (9th Cir. 2008)

**Order Taking Case En Banc:** 527 F.3d 797 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** May 16, 2008

**Status:** Argued and submitted June 24, 2008. Supplemental briefing ordered.

**Members of En Banc Court:** Alex Kozinski, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Richard R. Clifton, N. Randy Smith

**Subject Matter:** Appeal of the district court's denial of a habeas corpus petition challenging the Governor of California's reversal of the California Board of Prison Terms' decision to grant parole.

**Holding:** Not yet decided.

**Estrada-Espinoza v. Mukasey, 05-75850**

**Three-Judge Panel Opinion:** 498 F.3d 933 (9th Cir. 2007)

**Order Taking Case En Banc:** 525 F.3d 821 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** May 6, 2008

**En Banc Order:** 546 F.3d 1147 (9th Cir. 2008)

**Date of En Banc Order:** October 20, 2008

**Status:** Granted petition for review from the Board of Immigration Appeals' decision finding removability. Mandate issued December 12, 2008.

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Barry G. Silverman, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Richard R. Clifton

**Subject Matter:** Petition for review from the Board of Immigration Appeals' decision finding petitioner removable as an aggravated felon based upon his conviction for statutory rape, in violation of California Penal Code § 261.5(c).

**Holding:** Each of the four California statutory rape provisions, California Penal Code §§ 261.5(c), 286(b)(1), 288a(b)(1), and 289(h), proscribes conduct that is categorically broader than the generic definition of "sexual abuse of a minor." *Afridi v. Gonzales*, 442 F.3d 1212 (9th Cir. 2006) (holding that CPC § 261.5(c) categorically constitutes "sexual abuse of a minor") is overruled.

**United States v. Snellenberger, 06-50169**

**Three-Judge Panel Opinion:** 493 F.3d 1015 (9th Cir. 2007)

**Order Taking Case En Banc:** 519 F.3d 908 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** March 14, 2008

**En Banc Order:** 548 F.3d 699 (9th Cir. 2008)

**Date of En Banc Order:** October 28, 2008

**Status:** Affirmed district court's determination that prior conviction for burglary, in violation of California Penal Code § 459, qualified as a "crime of violence" under career offender provisions of Sentencing Guidelines.

**Members of En Banc Court:** Alex Kozinski, Stephen R. Reinhardt, Pamela Ann

Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Susan P. Graber, William A. Fletcher, Ronald M. Gould, Richard C. Tallman, Milan D. Smith, Jr.

**Subject Matter:** Appeal of criminal conviction for bank robbery and career offender sentence.

**Holding:** In applying the *Taylor* modified categorical approach, a district court may rely on a minute order prepared by a neutral officer of the court and whose content the defendant had the right to examine and challenge. The en banc court overruled *United States v. Diaz-Argueta*, 447 F.3d 1167, 1169 (9th Cir. 2006), to the extent it suggested the contrary.

**Fisher v. City of San Jose Police Dept., 04-16095**

**Three-Judge Panel Opinion:** 509 F.3d 952 (9th Cir. 2007)

**Order Taking Case En Banc:** 519 F.3d 908 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** March 14, 2008

**Status:** Argued and submitted June 26, 2008

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Sidney R. Thomas, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Jay S. Bybee, N. Randy Smith

**Subject Matter:** Appeal of district court's entry of judgment as a matter of law in a warrantless arrest 42 U.S.C. § 1983 action.

**Holding:** Not yet decided.

**Marmolejo-Campos v. Mukasey, 04-76644**

**Three-Judge Panel Opinion:** 503 F.3d 922 (9th Cir. 2007)

**Order Taking Case En Banc:** 519 F.3d 907 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** March 14, 2008

**Status:** Argued and submitted June 23, 2008.

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Barry G. Silverman, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Richard C. Tallman, Richard R. Clifton, Jay S. Bybee

**Subject Matter:** Petition for review from the Board of Immigration Appeals' decision finding that petitioner's state court conviction for aggravated driving under the influence constituted a crime involving moral turpitude.

**Holding:** Not yet decided.

**Redding v. Safford Unified School Dist. No. 1, 05-15759**

**Three-Judge Panel Opinion:** 504 F.3d 828 (9th Cir. 2007)

**Order Taking Case En Banc:** 514 F.3d 1383 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** January 31, 2008

**Status:** Reversed district court's summary judgment. Mandate stayed 7/31/08.

**En Banc Order:** 531 F.3d 1071 (9th Cir. 2008)

**Date of En Banc Order:** July 11, 2008

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Michael D. Hawkins, Barry G. Silverman, Kim M. Wardlaw, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Carlos T. Bea, Milan D. Smith, Jr., N. Randy Smith

**Subject Matter:** Appeal of the district court's summary judgment in favor of School District and officials, in a middle school student's 42 U.S.C. § 1983 action alleging that a strip search violated her Fourth Amendment rights.

**Holding:** School officials violated a thirteen-year-old student's Fourth Amendment right to be free of unreasonable search and seizure in strip-searching her for prescription-strength ibuprofen. The strip search was neither "justified at its inception" nor "reasonably related in scope to the circumstances" giving rise to its initiation. The school official in charge was not entitled to qualified immunity because these constitutional principles were clearly established at the time.

### **Abebe v. Mukasey, 05-76201**

**Three-Judge Panel Opinion:** 493 F.3d 1092 (9th Cir. 2007)

**Order Taking Case En Banc:** 514 F.3d 909 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** January 25, 2008

**Status:** Denied in part and dismissed in part a petition for review of the Board of Immigration Appeals' decision denying Immigration and Naturalization Act § 212(c) relief.

**En Banc Order:** 548 F.3d 787 (9th Cir. 2008)

**Date of En Banc Order:** November 20, 2008

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Andrew J. Kleinfeld, Sidney R. Thomas, Barry G. Silverman, Ronald M. Gould, Richard C. Tallman, Richard R. Clifton, Consuelo M. Callahan, Carlos T. Bea, N. Randy Smith

**Subject Matter:** Petition for review of the Board of Immigration Appeals' decision finding petitioner ineligible to apply for discretionary relief under former Immigration and Naturalization Act § 212(c), under *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005), and 8 C.F.R. § 1212.3(f)(5).

**Holding:** Immigration and Nationality Act § 212(c) only gives the Attorney General discretion to grant lawful permanent residents relief from inadmissibility, not deportation. The holding in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981) that there is no rational basis for providing § 212(c) relief from inadmissibility but not deportation is overruled.

**Garcia v. Brockway, 05-35647**

**Thompson v. Gohres Construction, 06-15042**

**Three-Judge Panel Opinion:** 503 F.3d 1092 (9th Cir. 2007)

**Order Taking Case En Banc:** 512 F.3d 1089 (9th Cir. 2008)

**Date of Order Taking Case En Banc:** January 7, 2008

**En Banc Order:** 526 F.3d 456 (9th Cir. 2008)

**Date of En Banc Order:** May 13, 2008

**Status:** The three-judge panel decision, *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007), as amended, is adopted as the opinion of the en banc court. Summary judgment and dismissal affirmed. Mandate issued in 05-35647 June 4, 2008.

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M.M. McKeown, Kim M. Wardlaw, Johnnie B. Rawlinson, Richard R. Clifton, Carlos T. Bea, N. Randy Smith

**Subject Matter:** Appeals of district courts' dismissals of Federal Housing Act suits as time-barred.

**Holding:** The two-year statute of limitations begins to run on a design-and-construction claim regarding accessibility features in multifamily dwellings at the conclusion of the design and construction phase, which is the date the last certificate of occupancy is issued.

**Navajo Nation v. United States Forest Service, 06-15371 / 06-15436 / 06-15455**

**Three-Judge Panel Opinion:** 479 F.3d 1024 (9th Cir. 2007)

**Order Taking Case En Banc:** 506 F.3d 717 (9th Cir. 2007)

**Date of Order Taking Case En Banc:** October 17, 2007

**Status:** Affirmed district court's judgment in favor of the United States Forest Service.

**En Banc Order:** 535 F.3d 1058 (9th Cir. 2008)

**Date of En Banc Order:** August 8, 2008

**Members of En Banc Court:** Alex Kozinski, Harry Pregerson, Diarmuid F. O'Scannlain, Pamela A. Rymer, Andrew J. Kleinfeld, Barry G. Silverman, William A. Fletcher, Raymond C. Fisher, Richard R. Clifton, Carlos T. Bea, Sandra S. Ikuta

**Subject Matter:** Appeal of the district court's summary judgment and judgment following a bench trial, in an action brought by Indian tribes and environmental groups under the Religious Freedom Restoration Act, the National Environmental Protection Act, and the National Historic Preservation Act, challenging the Forest Service's approval of a proposed expansion of the Arizona Snowbowl ski area on Humphrey's Peak.

**Holding:** The Tribes failed to establish a RFRA violation, because the presence of recycled wastewater on the ski area would not coerce the Tribes to act contrary to

their religious beliefs, nor would it condition a benefit upon conduct that would violate their religious beliefs. The Religious Land Use and Institutionalized Persons Act of 2000 is inapplicable to this case.

**Sarei v. Rio Tinto, PLC, 02-56256 / 02-56390**

**Three-Judge Panel Opinion:** 487 F.3d 1193 (9th Cir. 2007)

**Order Taking Case En Banc:** 499 F.3d 923 (9th Cir. 2007)

**Date of Order Taking Case En Banc:** August 20, 2007

**En Banc Order:** 2008 WL 5220286 (9th Cir. December 16, 2008)

**Date of En Banc Order:** December 16, 2008

**Status:** Remand for consideration, in the first instance, of whether exhaustion of local remedies was required, in dismissal of Alien Tort Statute ("ATS") action.

**Members of En Banc Court:** Mary M. Schroeder, Harry Pregerson, Stephen R. Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M.M. McKeown, Marsha S. Berzon, Johnnie B. Rawlinson, Consuelo M. Callahan, Carlos T. Bea, Sandra S. Ikuta

**Subject Matter:** Appeal of the district court's dismissal of a class action complaint brought by current and former residents of the island of Bougainville in Papua New Guinea against a mining company under the Alien Tort Claims Act.

**Holding:** Certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law. Defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies.